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SUPREME COURT, U.S.

No. 06-612

IN THE

Supreme Court of the United States

KEITH B. BARANSKI,
Petitioner

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, *ET AL.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner
**Counsel of Record*

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ARGUMENT

1) The Government argues that the "fact that the affidavit did not accompany the warrant *after* the warrant was issued did not retroactively render the issuance of the warrant invalid for purposes of the Warrant Clause." Brief For The Federal Respondents In Opposition (hereinafter "Brief") at 11.

The "manifest purpose" of the Particularity Clause is to "prevent general searches"; limiting the authorization to search to specific areas and things "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987). The Court earlier explained that:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, at 196 [(1927)].

Stanford v. Texas, 379 U.S. 476, 485-486 (1965).

If the particularity of a warrant is measured only when the warrant is issued, not when it is executed -- when the need for particularity is at its zenith -- the Particularity Clause is robbed of its content because it no longer serve its primary purpose: ensuring that "nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196.

Accordingly, while separating the affidavit from the warrant after the warrant is issued does not retroactively render the issuance of the warrant invalid, the fact that the affidavit does not accompany the warrant after the warrant was signed voids the warrant's compliance with the Particularity Clause since it is no longer the warrant issued by the magistrate and renders the warrant invalid prospectively.

Separating the affidavit from the warrant when compliance with the Particularity Clause is dependent upon the incorporation of the affidavit is tantamount to the executing officer rewriting the description of the things to be seized. Because a warrant must be "authorized by a neutral and detached judicial officer," *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979), and may thus not be rewritten by the executing officer, an affidavit which ensures a warrant's compliance with the Particularity Clause may not be separated from the warrant without the warrant becoming one which was not authorized by a neutral and detached judicial officer.

2) The Government contends that the "fact that the affidavit did not accompany the warrant *after* the warrant was issued" did not "render the search otherwise 'unreasonable' under the Fourth Amendment, at least where, as here, the officers were evidently aware of the items that they had authority to search for and seize. Pet. App. 23a." Brief at 11.[1]

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[1] At the page of the Appendix to the Petition noted by the Government, the court of appeals stated that "the record shows" that "the day before the search, agent Johnson met with the other agents and laid out a plan for executing the warrant, which included a description of the guns to be seized, a map of the warehouse, [and] the specific location within the warehouse where the guns would be seized . . . ." Pet. App. 23a. As this

Whether the officers were "aware of the items that they had authority to search for and seize" is immaterial because the text of the Fourth Amendment "unambiguously" requires that a *warrant* state with particularity the things to be seized. *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). Moreover, because the Fourth Amendment "by its terms requires particularity in the warrant, not in the supporting documents," 540 U.S. at 557, it is even more the case that the agent's knowledge of the things to be seized is not a substitute for a particularized warrant. Like unincorporated supporting documents which do not accompany the warrant, the agent's knowledge of the things to be seized does not advance any of the purposes for the Fourth Amendment's express mandate that the warrant itself describe the things to be seized.

In addition to ensuring that "nothing is left to the discretion of the officer executing the warrant," *Marron*, 275 U.S. at 196, particularity in the warrant provides "written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Groh*, 540 U.S. at 560. Finally, particularity "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). None of these purposes is advanced if the validity of a warrant is premised on the officer's knowledge.

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case was disposed of on a motion to dismiss the complaint, there was no record, other than the complaint, and there was nothing in the complaint concerning Agent Johnson's preparations for the search. It is thus unclear from what source the court of appeals reached this conclusion.

3) The Government asserts that, of the six courts of appeals whose decisions were cited in *Groh*:

> [F]our . . . had held (in decisions other than those cited in *Groh*) that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the affidavit (and the executing officers were aware of the relevant contents of the affidavit), see *United States* v. *Dale*, 991 F.2d 819, 846-848 (D.C. Cir.), cert. denied, 510 U.S. 906 and 1030 (1993); *United States* v. *Bonner*, 808 F.2d 864, 866-867 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987), or, at most, if the warrant incorporates the affidavit and the affidavit is "present" at the scene when the search is conducted (even if it does not physically "accompany" the copy of the warrant possessed by the executing officers), see *United States* v. *Tagbering*, 985 F.2d 946,950 (8th Cir. 1993); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989).

Brief at 13-14.

This statement is not entirely accurate. In *Dale, supra*, the D.C. Circuit concluded that the warrant "undoubtedly incorporated the limitations of the affidavit," but that "the record is not clear" whether the affidavit accompanied the warrant. 991 F.2d at 847. The court noted that the government stated that "'[i]n executing the warrant, the lead agent, Agent

Heidi Shintani, had the warrant and affidavit in her possession.'" *Id.* Further, the court observed that the defendants only argued that they "themselves did not see the affidavit at the search." 991 F.2d at 848. The court concluded that the evidence indicated:

> [A]t the very least, that Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements.

Id.

Thus, the D.C. Circuit did not overrule *United States v. Maxwell*, 920 F.2d 1028, 1032 (D.C. Cir. 1990)(warrant must "not only attach the affidavit, but must also contain 'suitable words of reference'")(cited in *Groh* at 558).

In *Bonner*, *supra*, the issue before the First Circuit was whether the description of the premises in an attachment to the warrant was sufficiently particular because the street address was not included. The court held that the premises was "described with sufficient particularity, and although the address was inadvertently omitted, there was no reasonable probability that another premises might be mistakenly searched; thus, the search warrant was valid." 808 F.2d at 867. *Bonner* did not address the issue here -- which had previously been addressed in *United States v. Roche*, 614 F. 2d 6, 8 (1st Cir. 1980)("settled law" that, to rely on affidavit, it must be "incorporated into the warrant and served with the warrant") --

let alone hold that "that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the affidavit (and the executing officers were aware of the relevant contents of the affidavit) . . . ." Brief at 13-14.

With respect to the Eighth and Sixth Circuit cases referenced by the Government (*Tagbering* and *Gahagan*), while they held that the particularity requirement is met if the warrant incorporates an affidavit which is "present" at the scene when the search is conducted, this is consistent with the requirement of the previous cases in those circuits, see *United States* v. *Curry*, 911 F.2d 72 (8th Cir. 1991) and *United States* v. *Blakeney*, 942 F.2d 1001 (6th Cir. 1991), because the presence of the affidavit at the scene ensures that the purposes of the Particularity Clause are advanced, *i.e.*, leaving nothing to the discretion of the officer executing the warrant, assurance that the magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit, and assurance to the individual whose property is searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search.[2]

4) The Government argues that the court of appeals' decision here only "appears to conflict with the pre-*Groh* decisions of at least the Ninth and Tenth Circuits as to whether an incorporated affidavit must accompany the warrant at the

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[2] The Government states that it "represented to the lower courts that a copy of the affidavit was in fact present at the scene (and thus available to agents) at the time of the search." Brief at 14, n.3. As the affidavit was under seal, unless the agents knowingly violated the sealing order, the affidavit could not have been at the scene.

time of the search" and that "apparent conflict . . . does not warrant the Court's review at this time" because "it is unclear whether the courts of appeals that have required accompaniment as well as incorporation will continue to apply the same rule in the wake of the Court's decisions in *Groh* and *Grubbs.*" Brief at 14. The court of appeals' decision here does not simply "appear" to conflict with pre-*Groh* decisions of the Ninth and Tenth Circuits; there is a direct conflict. Moreover, the court of appeals' decision here conflicts with pre-*Groh* decisions of the First Circuit (see *Roche*, *supra*); the Second Circuit (see *United States v. George*, 975 F.2d 72 (2nd Cir. 1992) and *United States v. Bianco*, 998 F.2d 1112 (2nd Cir. 1993));[3] the Third Circuit (see *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425 (3rd Cir. 2000)),[4] and the Eighth Circuit (*Curry*, *supra*, and *Tagbering*, *supra*). Further, in light of *Groh*'s implicit approval of the decisions of six circuits, it is highly unlikely that those circuits would not continue to apply the same rule.[5]

The Fourth and Seventh Circuits are in accord with the

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[3] *George* held that "[r]esort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it." 975 F.2d at 76. *Bianco* approved a search warrant which referred to an affidavit which "was present at the time of the search . . . ." 998 F.2d 1116-1117.

[4] *Bartholomew* adopted the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997). 221 F.3d at 428-430.

[5] Indeed, the First, Third, and Tenth Circuits have already made clear they will continue to apply the same rule. See *Rodriguez* v. *Beninato*, 469 F.3d 1 (1st Cir. 2006), *Doe v. Groody*, 361 F.3d 232 (3rd Cir. 2004), and *United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005).

Sixth Circuit in this case. In *United States* v. *Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006), the Fourth Circuit held that "it is sufficient *either* for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself." 459 F.3d at 471. The court noted that "[a]t least one other circuit subscribes to this view. See *Baranski v. Fifteen Unknown ATF Agents*, 452 F.3d 433 (6th Cir. 2006)(en banc)." *Id.* In *United States* v. *Jones*, 54 F.3d 1285, 1290-92 (7th Cir. 1995), the Seventh Circuit held that an affidavit supplying the requisite particularity need to uphold a challenged warrant need not be physically appended to the warrant or explicitly incorporated by reference where the magistrate considered the affidavit in issuing the warrant and the officers complied with the affidavit when executing the warrant.

In light of this plain conflict, particularly the Fourth and Sixth Circuit's rejection of *Groh* (to the extent *Groh* approvingly cited decisions from the First, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits, 540 U.S. at 557-558), the First, Third, and Tenth Circuits' reiteration of their positions following *Groh*, and in view of the split within the Sixth Circuit *en banc*, this case warrants this Court's review to resolve this issue of significance to law enforcement and the citizenry.

5) The Government argues that the court of appeals "correctly held that the ATF agents were entitled to qualified immunity" (Brief at 15) because a court is required to judge the reasonableness of their conduct "against the backdrop of the law at the time of the conduct." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*). The law to which the

Government then refers is Sixth Circuit case law: *United States* v. *Gahagan*, 865 F.2d 1492 (6th Cir. 1989), *Frisby* v. *United States*, 79 F.3d 29 (6th Cir. 1996), and *United States* v. *Brown*, 49 F.3d 1162 (6th Cir. 1995), cert. denied, 516 U.S. 942 (1995). Circuit case law, however, is immaterial under *Groh*'s qualified immunity analysis.[6] Rather than look to Ninth Circuit case law, *Groh* looked to the Fourth Amendment's text and the Court's cases applying that text,[7] and held that the agents did not have qualified immunity as "the particularity requirement is set forth in the text of the Constitution, [and] no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." 540 U.S. at 563. For the instant case, moreover, the Court's observation in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), is especially appropriate as to what a reasonable officer would have known:

> if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, *and attached the affidavit to the warrant*, the warrant would have been valid.

468 U.S. at 990, n.7 (emphasis added).

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[6] In any event, as the Petition explains (pages 24-27), Sixth Circuit case law makes clear that a reasonable officer would have known about the accompaniment requirement, depriving Respondents of qualified immunity.

[7] *Groh* noted (540 U.S. at 565) that *United States* v. *Leon*, 468 U.S. 897, 923 (1984) held that "a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid."

6) The Government contends that, unlike the warrant in *Groh*, the warrant here did not contain a "glaring deficiency" because it "expressly incorporated an affidavit listing with particularity the items to be seized . . . ." Brief at 17. *Groh* held that the warrant was "glaringly deficient" because it "did not describe the items to be seized at all." 540 U.S. at 558. Thus, whether the things-to-be-seized portion of the warrant "does not describe the items to be seized at all" because it was blank or contained erroneous information or incorporated another document (where the other document was not present), the warrant is "obviously deficient . . . ." The deficiency here was equally "glaring" because the agents knew that the affidavit was sealed and that it was not attached to the warrant.

7) The Government contends that, even if the agents were not entitled to qualified immunity, the court of appeals' decision "could be affirmed on the alternative ground that petitioner's *Bivens* action constituted a collateral attack on his criminal conviction and was therefore barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994)." As the Government notes, however, *Heck* only forecloses a portion of Petitioner's action: "damages for [Petitioner's] injured reputation and mental anguish, as well as his request for punitive damages" are recoverable. Pet. App. 56a. Thus, *Heck* is not an alternative ground for affirmance and is not a reason to deny review.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner
*Counsel of Record

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